No. 85-1078

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZAYLE A. BERNSTEIN,

Petitioner,

v.

PORTLAND SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS

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Petitioner respectfully submits this memorandum in reply to respondent's brief in opposition. In its brief in opposition, respondent makes only three arguments, each of which totally ignores the merits of the constitutional issues raised in the petition and either disregards or misrepresents the factual record.

1. Respondent first contends (Br. Opp. 1-2) that petitioner cannot raise the constitutional questions presented for review here because he allegedly failed to prove that the law firm of DiGiulian, Spellacy & Bernstein, P.A. was a professional association, a necessary predicate for raising those questions. Respondent's contention is contrary to the record evidence:

(a) At the jurisdictional hearing, petitioner introduced the law firm's articles of incorporation (DX2);

(b) Bruno DiGiulian and Sidney T. Bernstein testified that the law firm was incorporated as a professional association (Tr. 93, 589-590);

(c) Respondent introduced no evidence at the hearing to contest the validity of the law firm's incorporation as a professional association;

(d) Respondent conceded in its First Amended Original Petition that the law firm was a professional association (R. 53-54);

(e) There was no evidence that petitioner was a partner in the law firm or that petitioner had authorized Sidney T. Bernstein to act as his personal agent with respect to petitioner's association with or ownership position in the law firm; and

(f) The trial court ruled, based on the evidence adduced at the jurisdictional hearing, that the law firm was incorporated as a professional association (Pet. App. 4).

In short, there can be no question that petitioner established that the law firm was a corporation. The only conceivable basis for respondent's contrary contention appears, not in the trial evidence or in the findings of the trial court, but in the "finding" of the Court of Appeals that petitioner neglected to show the registration of a fictitious name (Pet. App. 17), a factual matter which was neither alleged nor raised by respondent at the jurisdictional hearing. A defendant certainly cannot be required to rebut factual contentions never raised by the plaintiff. Moreover, in view of petitioner's abundant evidence concerning the corporate nature of the law firm, and in view of respondent's concession concerning that fact (R. 53-54), the "finding" made by the Court of Appeals was simply

a *post hoc* (and transparently inadequate) justification for asserting jurisdiction where it was unsupported by the record. By itself, this "finding" demonstrates a denial of due process.

That the case at bar warrants review by this Court is underscored by this Court's recent grant of certiorari in *Connolly v. Burt*, No. 85-298, which involves a non-resident defendant who was never present in the forum state and whose only contact with that state consisted of responding to a request made by one of its residents. Unlike the non-resident defendant in *Connolly*, petitioner here had *no* contacts whatever with the State of Texas, as both courts below properly found (Pet. App. 5, 16).[1] Thus, the far more extreme assertion of jurisdiction in the case at bar clearly warrants review.

2. As we have previously shown (Pet. 18-22), personal jurisdiction over petitioner cannot be premised solely upon his brother's acts. The agency cases upon which respondent relies (Br. Opp. 2) are wholly inapposite here. Although Sidney T. Bernstein was undoubtedly acting as an agent for his client, Legal Braswell Government Securities, Inc., and may have acted, in his capacity as an employee, as an agent of the law firm, he was not an agent of petitioner.[2] The evidence showed only that Sidney T. Bernstein was petitioner's brother (Tr. 1021).

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[1] The situation in *Connolly* is analagous to that of Sidney T. Bernstein who, in the course of his professional representation of a client, communicated with a Texas attorney and, as a matter of professional courtesy, traveled to Texas to attend a settlement conference requested by the Texas attorney. *See* Pet. 18, 23 n. 13.

[2] Respondent filed a separate action against Legal Braswell and has already settled with the law firm, which originally was named as a defendant in the present case.

No evidence whatever was adduced to show that petitioner had authorized Sidney T. Bernstein to act as his agent. Thus, there is no basis for asserting jurisdiction over petitioner.

3. On the issue of waiver, respondent does not contest any of the factual assertions contained in the petition (Pet. 7-10, 22-23). Lacking any authority for the proposition that a plaintiff may delay a hearing on the question of jurisdiction until the eve of trial on the merits, refuse to provide discovery to the defendant, and refuse to comply with court orders mandating discovery, thus forcing a non-resident defendant to choose between contesting jurisdiction and defending the case on the merits, respondent merely asserts that waiver "is a matter upon which States may differ" (Br. Opp. 2-3). But states may differ on this point only within the limits imposed by the Due Process Clause. The facts of this case demonstrate with abundant clarity that the Texas Court of Appeals, in its effort to make Texas courts "the Courthouse of the World" (*Hall v. Helicopteros Nacionales de Colombia*, 638 S.W.2d 870, 877 (Tex. 1982), (Pope, J. dissenting), *rev'd*, 466 U.S. 408 (1984)), acknowledges no such constitutional limitations. It is the constitutional responsibility of this Court, as it has recognized on numerous occasions, to prevent state courts from improperly asserting personal jurisdiction over non-resident defendants. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

It is respectfully submitted that the petition for a writ of certiorari should be granted and the case set down for plenary review.

Respectfully submitted,

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